

CHAPTER 21

PURCHASES

- Art. I. General Provisions, §§21-1--21-11
 - Div. 1. Purpose and Application, §§21-1--21-10
 - Div. 2. Definitions, §21-11
- Art. II. Organization, §§21-12--21-20
- Art. III. Cooperative Procurement, §§21-21--21-24
- Art. IV. Methods of Procurement - Bonds, §§21-25--21-54
 - Div. 1. Methods of Procurement, §§21-25--21-45
 - Div. 2. Bonds, §§21-46--21-54
- Art. V. Appeals and Remedies for Bid Protests, §§21-55--21-64
- Art. VI. Assistance to Small and Disadvantaged Businesses, §§21-65--69
- Art. VII. Ethics in Public Contracting, §§21-70--21-78

ARTICLE I. GENERAL PROVISIONS

DIVISION 1. PURPOSE AND APPLICATION

SECTION 21-1. PURPOSE.

The purpose of this chapter is to increase public confidence in purchasing by the City , to encourage competition in public purchasing among bidders and to obtain high quality goods and services at the lowest possible price. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTION 21-2. APPLICATION.

This chapter applies to contracts for the procurement of goods, services, insurance and construction entered into by the City and every expenditure for public purchasing from non-governmental contractors irrespective of its source.

When the procurement involves the expenditure of federal assistance or contract-funds, the procurement shall be conducted in accordance with any applicable mandatory federal law and regulation which are not reflected in this chapter. Nothing in this chapter shall prevent any public agency from complying with the terms and conditions of any grant, gift, or bequest which are otherwise consistent with law. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

WINCHESTER CODE

SECTION 21-3. EFFECTIVE DATE OF CHAPTER.

This chapter shall become effective upon adoption. The provisions of this chapter shall not apply to those contracts entered into prior to adoption hereof, which shall continue to be governed by the procurement policies and regulations of the City in effect at the time those contracts were executed, to the extent of any inconsistencies between such regulations and policies and this chapter. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTION 21-4. SEVERABILITY.

If any provision of this chapter or any application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this chapter which can be given effect without the invalid provision, and to this end the provisions of this chapter are declared to be severable. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTIONS 21-5 - 21-10. RESERVED.

DIVISION 2. DEFINITIONS

SECTION 21-11. DEFINITIONS.

- (a) Construction. Building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.
- (b) Purchasing Agent. For the purposes of this chapter only, the term "purchasing agent" shall mean the person designated by the city manager to carry out the duties set out in this chapter.
- (c) Cost analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.
- (d) Cost data. Factual information concerning the cash outlays for labor, material, overhead, and other cash outlays which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

PURCHASES

- (e) Employee. Any individual receiving salary or wages from the City, whether elected or not; any non-compensated individual performing-personal services for the city or any department, agency, commission, council, board or any other entity established by the executive or legislative branch of the City; and any non-compensated individual serving as an elected official of the city.
- (f) Goods. All material, equipment, supplies, printing and automated data processing hardware and software.
- (g) Invitation to bid. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any invitation for bids.
- (h) Local bidder or offeror. A bidder or offeror having its headquarters, primary place of business, or place of operations within the City of Winchester, Virginia.
- (i) Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry, or professional engineering.
- (j) Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.
- (k) Request for proposals. All documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (l) Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.
- (m) Services. Any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.
- (n) Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.
- (o) Small businesses. A United States business which is independently owned and which is not an affiliate or subsidiary of a business dominant in its field of operation.

WINCHESTER CODE

- (p) Specification. Any description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 004-92, 4-14-92; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-37.

ARTICLE II. ORGANIZATION.

SECTION 21-12. ESTABLISHMENT, BOND, APPOINTMENT.

1. The purchasing agent shall be responsible for the management of procurement.
2. The purchasing agent may delegate authority to procure goods or services under this chapter to other city officials, as such delegation is deemed necessary for the effective procurement of those items. However, such designated officials shall have no authority to take any actions set forth in §§21-29, 36, 37, 48 through 51, or 55 through 62. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-13. AUTHORITY AND DUTIES.

1. Principal Public Purchasing Official. The purchasing agent shall be responsible for the procurement of goods, services, insurance and construction in accordance with this chapter, as well as the management and disposal of goods and supplies.
2. Duties, Powers. In accordance with this chapter, and subject to the supervision of the city manager, the purchasing agent shall:
 - a. purchase or supervise the purchasing of all goods, services, insurance and construction needed by this accordance with this chapter;
 - b. exercise direct supervision over the city's central stores and general supervision over all other inventories of goods belonging to the city;
 - c. sell, trade or otherwise dispose of surplus goods belonging to the city;
 - d. establish and maintain programs for specifications development, contract administration and inspection and acceptance, in cooperation with the public agencies using the goods, services, and construction; and

PURCHASES

- e. have the authority to issue regulations and procedures consistent with this chapter, and forms for the carrying out of this chapter. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-14. UNAUTHORIZED PURCHASES.

Except as herein provided no official, elected or appointed, or any employee shall purchase or contract for any goods, services, insurance, or construction within the purview of this chapter other than by and through the purchasing department or, as provided herein and in the regulations adopted pursuant to this chapter, the appropriate department or agency head. Any purchase order or contract made contrary to the provisions hereof shall not be approved and the city shall not be bound thereby. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTIONS 21-15 - 21-20. RESERVED.

ARTICLE III. COOPERATIVE PROCUREMENT

SECTION 21-21. CONDITIONS FOR USE.

The city may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with the City shall comply with the policies and procedures adopted by this chapter except as otherwise provided by law. (Ord. No. 002-83, 1-11-83, Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-40.

SECTIONS 21-22 - 21-24. RESERVED.

WINCHESTER CODE

ARTICLE IV. METHODS OF PROCUREMENT - BONDS

DIVISION 1. METHODS OF PROCUREMENT

SECTION 21-25. METHODS OF PROCUREMENT.

- (a) All public contracts with non-governmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section unless otherwise authorized by law. Any contract not exceeding \$5,000 may be made in accordance with small purchase procedures as hereinafter provided.
- (b) Professional services shall be procured by competitive negotiation. However, where the cost of professional services is expected to be less than \$20,000, the purchasing agent, upon approval by the city manager, may procure such services by competitive sealed bidding.
- (c) Construction shall be procured only-by competitive sealed bidding. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-26. COMPETITIVE SEALED BIDDING.

Procurement of contracts by means of competitive sealed bidding shall be carried out as follows:

- (a) The purchasing agent shall issue a written Invitation to Bid to all potential contractors whose names are on the portion of the bidders' list maintained in the purchasing office for the type of goods or services similar in character to the goods or services being procured.

The purchasing agent shall also post the Invitation to Bid on the public bulletin board in the city hall at least 10 days prior to the last date set for the receipt of bids. The purchasing agent is further authorized to advertise the Invitation to Bid in one or more newspapers or trade or business periodicals, and to solicit bids from any other persons not on the bidders' list.
- (b) The Invitation to Bid shall contain or incorporate by reference the specifications and contractual terms and conditions applicable to the procurement. Unless prequalification is utilized in the procurement, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors.
- (c) Multi-Step Sealed Bidding. When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation to Bid

PURCHASES

may be issued requesting the submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.

- (d) Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation to Bid. The amount of each bid, and such other relevant information as the purchasing agent deems appropriate, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection except as otherwise provided by law.
- (e)
 - 1. Bid Evaluation. In determining the lowest responsible bidder the purchasing agent or designated official shall consider:
 - a. The ability, capacity and skill of the bidder to perform the contract or provide the service required;
 - b. Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference;
 - c. The character, integrity, reputation, judgment, experience, and efficiency of the bidder;
 - d. The quality of performance of previous contracts or services;
 - e. The previous and existing compliance by the bidder with laws and chapters relating to the contract or service;
 - f. The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;
 - g. The quality, availability and adaptability of the goods, or services to the particular use required;
 - h. The ability of the bidder to provide future maintenance and service for the use of the subject of the contract;
 - i. The number and scope of conditions attached to the bid.
 - 2. The purchasing agent shall further evaluate the compliance and responsiveness of the bids to the terms of the Invitation to Bid.
- (f) Bid Award. The contract shall be awarded to the lowest responsive and responsible bidder as determined under §21-26.E. When the terms and conditions of multiple bids are so provided in the invitation to bid, awards may be made to more than one bidder.

WINCHESTER CODE

Unless canceled or rejected, a responsible bid from the lowest responsive and responsible bidder shall be accepted as submitted except that if the bid from such bidder exceeds available funds, the City may negotiate with such bidder to obtain a contract price with available funds.

If, as authorized by law, the award is not given to the lowest bidder, a full and complete statement of the reasons for awarding a contract to another bidder shall be prepared by the purchasing agent or designated official and filed with the other papers relating to the transaction and shall be reported to the city manager. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-11-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-37.

SECTION 21-27. COMPETITIVE NEGOTIATION.

Procurement of contracts by competitive negotiation shall be carried out as follows:

- (a) The purchasing agent shall issue a written Request for Proposal to all potential contractors whose names are on the portion of the bidders' list maintained in the purchasing office for the type of goods or services similar in character to the goods or services being procured.

The purchasing agent shall also post the Request For Proposals on the public bulletin board in the city hall at least 10 days prior to the last date set for the receipt of bids, is further directed to publish the request for proposal in one or more of general circulation in the City of Winchester area and is authorized to solicit proposals from any other persons, not on the bidders' list.

- (b) The Request For Proposal shall indicate in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.
- (c) Procurement of professional services. The purchasing agent and other, appropriate officials designated by the purchasing agent shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. At the discussion stage, the purchasing agent may discuss nonbinding estimates of total project costs, including, but not

PURCHASES

limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of such discussions on the basis of evaluation factors published in the request for proposal and all information developed in the selection process to this point, the purchasing agent and designated officials shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the city can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the purchasing agent and such designated officials determine in writing that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

- (d) Procurement of other than professional services. Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposals, including price if so stated in the request for proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, purchasing agent and such designated officials shall select the offeror which, in their opinion, has made the best proposal, and shall recommend to the city manager the award of the contract to that offeror. The city manager may award the contract to that offeror or may refer the matter back to the purchasing agent for another recommendation. Should the purchasing agent and such designated officials determine in writing that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror. (Ord. No. 002-83, 1-11-83; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-37.

SECTION 21-28. SOLE SOURCE PROCUREMENT.

Upon a determination in writing by the purchasing agent that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The purchasing agent shall issue a written notice stating that only one price was determined to be practically available, and identifying that which is being procured, the contractor being selected, and the date on which the contract was or will be awarded. This notice shall be posted on the

WINCHESTER CODE

public bulletin board in the city hall on the day the purchasing agent awards or decides to award the contract, whichever occurs first. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-41.D.

SECTION 21-29. EMERGENCY PROCUREMENT.

If any emergency occurs during regular city business hours, the using department shall immediately notify the purchasing agent who shall either purchase the required supplies or contractual services or authorize the department to do so.

If an emergency occurs at times other than regular business hours, the using department may purchase directly the required goods or contractual services. The department, shall, however, whenever practicable, secure competitive telephone bids and order delivery to be made by the lowest responsible bidder. The department shall also, not later than the next regular city business day thereafter, submit to the purchasing agent a requisition, a tabulation of bids received, if any, a copy of the delivery record and a brief written explanation of the circumstances of the emergency.

In either case, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The purchasing agent shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. The notice shall be posted on the public bulletin board in the city hall on the day the purchasing agent awards or announces his decision to award the contract, whichever comes first, or as soon thereafter as is practicable. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-41.E.

SECTION 21-30. SMALL PURCHASES.

Any single or term contract not expected to exceed \$15,000 and contracts for single-user microcomputers and related peripheral equipment and services not expected to exceed \$30,000 may be made in accordance with small purchase procedures adopted by the city manager.

All other purchases shall be made in accordance with the provisions of this chapter (Ordinance No. 002-83, 1-83; Ord. No. 013-88, 3-08-88; Ord. No. 004-92, 4-14-92; Ord. No. 049-95, 10-17-95)

PURCHASES

State Law Reference--Code of Virginia, §11-41.F.

SECTION 21-31. PROCUREMENT OF USED GOODS.

Notwithstanding any other provision of this chapter to the contrary, a contract for the purchase of any used goods, the price of which is less than One Hundred Thousand (\$100,000.00) Dollars, may be entered into without competitive sealed bidding or competitive negotiation. However, as much competition as is practicable under the circumstances shall be employed. For each such contract the purchasing agent shall determine in writing that as much competition as is practicable has been carried out. Such writing, a copy of which shall be kept in the contract file, and in the procurement file, shall contain the following information:

1. A statement listing the goods, including any specifications, being procured.
2. The need or use for such goods.
3. (a) A list of possible suppliers, if any, based on prior contracts, prior procurement of such goods, or informal contacts concerning such goods or similar goods, or a statement that other suppliers are not reasonably available.

(b) Which, if any of such suppliers were contacted concerning the goods sought to be procured, documenting when each was contacted.
4. A statement of whether or not alternate goods were available. If such goods were available, a description of the reason the goods procured were selected.
5. The name and address of the supplier chosen.
6. The date of the contract award.

(Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

WINCHESTER CODE

SECTION 21-32. EXCEPTIONS.

The following goods and services may be procured without competition:

- (a) Sheltered workshops, State Penitentiary, State Contracts.
 - 1. Purchases from persons, schools or workshops under the supervision of the Virginia Department for the Visually Handicapped or non-profit sheltered workshops or other non-profit organizations which offer transitional or supported employment services serving the handicapped.
 - 2. Purchases from the State Penitentiary.
 - 3. Purchases from state contracts from the state purchasing department warehouse.
- (b) Attorneys, Expert Witnesses. Legal services associated with actual or potential litigation, and expert witnesses or other services associated with litigation or regulatory proceedings.
- (c) Contract extension. Extension of the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.
- (d) Insurance pools. Contracts for insurance if purchased through an association of which the City is a member if the association was formed and is maintained for the purpose for promoting the interest and welfare of developing close relationships with similar public bodies, provided such association has procured the insurance by use of competitive principles and provided that the purchasing agent has made a determination in advance after reasonable notice to the public in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination. Posting the writing at least ten (10) days prior to final determination on public bulletin board in city hall shall constitute reasonable notice to the public. (Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-45.

SECTION 21-33. COMPETITIVE BIDDING ON STATE AID PROJECTS.

No contract for the construction of any building or improvement of or addition to an existing building by the City or subdivision of the City for which state funds of fifteen thousand dollars (\$15,000) or more, either by appropriation, grant-in-aid or loan are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation. The procedure for the

PURCHASES

advertising for bids or for proposals and for letting of the contract shall conform, *mutatis mutandis*, to this chapter. No person or firm shall be eligible to bid on or submit a proposal for any such contract under competitive sealed bidding or competitive negotiation procedures nor to have the same awarded to him or it who has been engaged as architect or engineer in the same project under a separate contract. (Ord. No. 036-83, 12-13-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-41.1.

SECTION 21-34. CANCELLATION OR REJECTION OF BIDS. WAIVER OF INFORMALITIES.

- (a) An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected in whole or in part when the purchasing agent determines that it is in the best interest of the city to do so. The reasons therefor shall be made a part of the contract file and shall be reported to the city manager.
- (b) The purchasing agent or designated official may waive informalities in bids or proposals. (1982, c. 647.) (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-42.

SECTION 21-35. CONTRACT PRICING ARRANGEMENTS - MULTI-TERM CONTRACTS.

- (a) Except as prohibited under the Virginia Public Procurement Act, public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited.
- (b) Except in case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost-plus a percentage of cost. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

WINCHESTER CODE

(c) Multi-term Contracts.

1. Specified Period. Unless otherwise provided by law, a contract for goods, services or insurance may be entered into for any period of time deemed to be in the best interests of the city provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
2. Cancellation Due to Unavailability Of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-43.

SECTION 21-36. PREQUALIFICATION.

The purchasing agent is authorized to prequalify bidders prior to the issuance of any invitation for bids, whether for goods, services, insurance or construction, by requiring prospective bidders to submit such information as he shall deem appropriate, including samples, financial reports, and references; provided, however, that opportunity to prequalify shall be given to any prospective bidder who has not been suspended or debarred under this chapter.

The purchasing agent may refuse to prequalify any prospective contractor, provided that written reasons for refusing to prequalify are made a part of the record in each case. The decision of the purchasing agent shall be final.

In considering any request for prequalification, the purchasing agent shall determine whether there is reason to believe that the bidder possesses the management, financial soundness, and history of performance which indicate apparent ability to successfully complete the plans and specifications of the invitations for bid. The purchasing agent may employ standard forms designed to elicit necessary information, or may design other forms for that purpose.

Prequalification of a bidder shall not constitute a conclusive determination that the bidder is responsible, and such bidder may be rejected as nonresponsible on the basis of subsequently discovered information.

Failure of a bidder to prequalify with respect to a given procurement shall not bar the bidder from seeking prequalification as to future procurements, or from bidding on

PURCHASES

procurements which do not require prequalification. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-46.

SECTION 21-37. DEBARMENT.

- (a) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the purchasing agent, after consulting with the city attorney, is authorized to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. After consultation with the city attorney the purchasing agent, if appropriate, shall suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall not be for a period exceeding one year. The causes for debarment include:
1. Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 2. Conviction under state and federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a city contractor;
 3. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
 4. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered as a basis for debarment;
 5. Any other cause the purchasing agent determines to be so serious and compelling as to affect responsibility as a city contractor including debarment by another governmental entity for any cause in this chapter;
 6. For violation of the ethical standards set forth in this chapter.
- (b) The purchasing agent shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the-debarred or suspended person involved of his rights concerning judicial or administrative

WINCHESTER CODE

review. A copy of the decision shall be mailed or otherwise furnished immediately to the debarred or suspended person.

- (c) A decision to debar or suspend shall be final and conclusive, unless the debarred or suspended person within 10 days after receipt of the decision files an appeal to the city manager. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-46.1.

SECTION 21-38. TIE BIDS - PREFERENCE FOR VIRGINIA AND LOCAL PRODUCTS AND FIRMS.

Except as set forth below, in the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations, if such a choice is available; otherwise the tie shall be decided by lot.

If all bids received are for the same total amount or unit price, quality and service being equal, the contract shall be awarded to a local bidder.

In the event that there is a tie bid, the tie bidders shall be invited to resubmit written bids below the original bid, and award shall be made to the bidder with the lowest bid price. Any price quote made verbally shall be confirmed in writing in order to be eligible for consideration.

In the event that none of the foregoing provisions of this section resolve the tie, the purchasing agent may cancel the solicitation and rebid. Records shall be kept of any proceeding connected with tie bids. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-47.

SECTION 21-39. USE OF BRAND NAMES.

Unless otherwise provided in the invitation to bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character, and quality of the article desired, and any article which the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, suitability for the purpose intended, shall be accepted. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-49.

SECTION 21-40. COMMENTS CONCERNING SPECIFICATIONS.

PURCHASES

For complex construction, goods, equipment, supplies or repair, pre-bid conferences with prospective bidders are desirable after draft specifications have been prepared. Conferences on purchasing bids may be called by the purchasing agent and attended by a department representative and, if necessary, the city attorney.

Otherwise, prospective bidders may submit comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal for consideration by the purchasing agent at least ten (10) days prior to deadline for receipt of bids, for his consideration. (Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-50.

SECTION 21-41. EMPLOYMENT DISCRIMINATION BY CONTRACTOR PROHIBITED.

The City shall include in every contract of over ten thousand dollars (\$10,000) the provisions of 1 and 2 herein:

1. During the performance of this contract, the contractor agrees as follows:
 - a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin except where sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
 - c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
2. The contractor will include the provisions of the foregoing paragraphs a, b, and c in every subcontract or purchase order of over ten thousand dollars (\$10,000), so that the provisions will be binding upon each subcontractor or vendor. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11.51.

SECTION 21-41.1. PAYMENT CLAUSES TO BE INCLUDED IN CONTRACTS.

WINCHESTER CODE

Any contract awarded by the City shall include:

1. A payment clause which obligates the contractor to take one of the two following actions within seven (7) days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:
 - a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or
 - b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.
2. An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven (7) days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1 b of this section.
3. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent (1%) per month."

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section may not be construed to be an obligation of the City. A contract modification may not be made for the purpose of providing reimbursement for such interest charge. A cost reimbursement claim may not include any amount for reimbursement for such interest charge. (Ord. No. 049-95, 10-17-95)

SECTION 21-41.2. PUBLIC CONSTRUCTION CONTRACT PROVISIONS BARRING DAMAGES FOR UNREASONABLE DELAYS DECLARED VOID.

- (a) Any provision contained in any public construction contract entered into on or after July 1, 1991, that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay, in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the public body, its agents or

PURCHASES

employees and due to causes within their control is against public policy and is void and unenforceable.

- (b) Subsection (a) shall not be construed to render void any provision of a public construction contract that:
 - 1. Allows a public body to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
 - 2. Requires notice of any delay by the party claiming the delay;
 - 3. Provides for liquidated damages for delay; or
 - 4. Provides for arbitration or any other procedure designed to settle contract disputes.
- (c) A contractor making a claim against a public body for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the public body and shall pay it for a percentage of all costs incurred by the public body in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact. (Ord. No. 049-95, 10-17-95)

SECTION 21-42. PUBLIC ACCESS TO PROCUREMENT INFORMATION.

- (a) Except as provided in the Virginia Public Procurement Act, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act.
- (b) Cost estimates relating to a proposed procurement transaction prepared by or for the city shall not be open to public inspection.
- (c) Any bidder or offeror, upon request, shall be afforded the opportunity to inspect bid and proposal records within a reasonable time after the opening of all bids but prior to award, except in the event that the City decides not to accept any of the bids or proposals and to reopen the contract. Otherwise, bid and proposal records shall be open to public inspection only after award of the contract.
- (d) Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

WINCHESTER CODE

- (e) Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction shall not be subject to public disclosure under the Virginia Freedom of Information Act. However, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-52.

SECTION 21-43. WITHDRAWAL OF BID DUE TO ERROR.

- (a) A bidder for a public construction contract may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

The procedure for withdrawal of bids shall be as follows, and shall be stated in the bid advertisement:

The bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure.

- (b) Procedures for the withdrawal of bids for other than construction contracts may be established by the assistant city manager.
- (c) No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.
- (d) If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.
- (e) No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

PURCHASES

- (f) If the purchasing agent denies the withdrawal of a bid under the provisions of this section, he shall notify the bidder in writing stating the reasons for his decision and award the contract to such bidder at the bid price, if the bidder is a responsible and responsive bidder. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-54.

SECTION 21-44. CONTRACT MODIFICATION.

A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or ten thousand dollars (\$10,000), whichever is greater, without the advance written approval of the City Council. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-55.

SECTION 21-45. RETAINAGE ON CONSTRUCTION CONTRACTS.

- (a) In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with not more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.
- (b) Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-56.

WINCHESTER CODE

DIVISION 2. BONDS

SECTION 21-46. BID BONDS ON CONSTRUCTION CONTRACTS.

- (a) Except in cases of emergency, all bids or proposals for construction contracts in excess of twenty-five thousand dollars (\$25,000) shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, the bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.
- (b) No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-57.

SECTION 21-47. PERFORMANCE AND PAYMENT BONDS ON CONSTRUCTION CONTRACTS.

- (a) Upon the award of any public construction contract exceeding twenty-five thousand dollars (\$25,000) awarded to any prime contractor, such contractor shall furnish to the city the following bonds:
 - 1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.
 - 2. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.
- (b) Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.
- (c) Bonds shall be made payable to the City of Winchester.

PURCHASES

- (d) Each of the bonds shall be filed with the purchasing agent.
- (e) Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-58.

SECTION 21-48. BONDS FOR OTHER THAN CONSTRUCTION CONTRACTS.

At the discretion of the purchasing agent, bidders may be required to submit with their bid a bid bond in an amount to be determined by the purchasing agent and specified in the Invitation to Bid or Request for Proposals, which shall be forfeited to the City as liquidated damages upon the bidder's failure to execute a contract awarded to him or upon the bidder's failure to furnish any required performance or payment bonds in connection with a contract awarded to him.

The purchasing agent may require successful bidders to furnish a performance bond and/or a payment bond at the expense of the successful bidder, the amounts to be determined and specified in the Invitation to Bid or Request for Proposal, to ensure the satisfactory completion of the work for which a contract is awarded. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-62.

SECTION 21-49. ACTIONS ON PERFORMANCE BOND.

No action against the surety on a performance bond shall be brought unless within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty, if the action be for such. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-59.

WINCHESTER CODE

SECTION 21-50. ACTIONS ON PAYMENT BONDS.

- (a) Subject to the provisions of subsection (b) hereof, any claimant who has performed labor or furnished materials in accordance with the contract for which a payment bond has been given, and who has not been paid in full therefor before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The obligee named in the bond need not be named a party to such action.
- (b) Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performance or materials furnished, shall not be subject to the time limitations stated in this subsection.
- (c) Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-60.

SECTION 21-51. ALTERNATIVE FORMS OF SECURITY.

- (a) In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.
- (b) If approved by the city attorney, a bidder may furnish a personal bond, property bond, or bank or savings and loan association's letter of credit on certain designated funds in the face amount required for the bid payment or performance bond. Approval shall be granted only upon a determination that the alternative

PURCHASES

form of security preferred affords protection to the City equivalent to a corporate surety's bond. (Ord. No. 003-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-61.

SECTIONS 21-52 - 21-54. RESERVED.

ARTICLE V. APPEALS AND REMEDIES FOR BID PROTESTS

SECTION 21-55. INELIGIBILITY OF BIDDER, OFFEROR OR CONTRACTOR.

- (a) Any bidder, offeror, or contractor refused permission to, or disqualified from, participating in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror, or contractor appeals within thirty days of receipt of such notice by instituting legal action as provided in the Virginia Public Procurement Act.
- (b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations, the sole relief shall be restoration of eligibility. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-63.

SECTION 21-56. APPEAL OF DENIAL OF WITHDRAWAL OF BID.

- (a) A decision denying withdrawal of bid under the provisions of Sec. 21-43 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by instituting legal action as provided in the Virginia Public Procurement Act.
- (b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of Sec. 21-43, prior to appealing, shall deliver to the purchasing agent a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.
- (c) If, upon appeal, it is determined that the decision refusing withdrawal of the bid was arbitrary or capricious, the sole relief shall be withdrawal of the bid. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

WINCHESTER CODE

State Law Reference--Code of Virginia, §11-64.

SECTION 21-57. DETERMINATION OF NONRESPONSIBILITY.

- (a) Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days by instituting legal action as provided in the Virginia Public Procurement Act.
- (b) If, upon appeal, it is determined that the decision of the purchasing agent was arbitrary or capricious, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If, after an award, it is determined that the decision of the purchasing agent was arbitrary or capricious, the relief shall be as set forth in Sec. 21-58(B).
- (c) A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under Sec. 21-58 of this chapter.
- (d) Nothing contained in this section shall be construed to require the city when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous . (Ord. No. 002-83, 1-11-83; Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-65.

SECTION 21-58. PROTEST OF AWARD OR DECISION TO AWARD.

- (a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the city manager no later than ten days after the award or the announcement of the decision to award, whichever occurs first. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The city manager shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by instituting legal action as provided in the Virginia Public Procurement Act.
- (b) If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The purchasing

PURCHASES

agent shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the city manager may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

- (c) Where the city manager determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation, Article 4, Chapter 7, Title 11 of the Code of Virginia (Ethics in Public Contractor), the city manager may enjoin the award of the contract to a particular bidder. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-66.

SECTION 21-59. EFFECT OF APPEAL UPON CONTRACT.

Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this chapter shall not be affected by the fact that a protest or appeal has been filed. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-67.

SECTION 21-60. STAY OF AWARD DURING PROTEST.

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-68.

SECTION 21-61. CONTRACTUAL DISPUTES.

- (a) Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment. However, written notice of the contractor's intention to file such claim must be at the time of the occurrence

WINCHESTER CODE

or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

- (b) A procedure for consideration of contractual claims shall be included in each contract. Such procedure, which may be incorporated into the contract by reference, shall establish a time limit for a final decision in writing by the city manager.
- (c) A contractor may not institute legal action as provided in the Virginia Public Procurement Act prior to receipt of the decision on the claim, unless the purchasing agent fails to render such decision within the time specified in the contract.
- (d) The decision of the city manager shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the City mayor by instituting legal action as provided in the Virginia Public Procurement Act. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-69.

SECTION 21-62. REPEALED.

(Ord. No. 049-95, 10-17-95)

SECTIONS 21-63 - 21-64. RESERVED.

PURCHASES

ARTICLE VI. ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES

SECTION 21-65. ESTABLISHMENT OF PROGRAMS TO EXPAND PARTICIPATION.

It is the policy of the City to encourage the participation of small businesses and businesses owned by women and minorities to participate in city procurement transactions. The purchasing agent shall establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. Such programs shall be in writing, and shall include cooperation with the State Office of Minority Business Enterprise, the United States Small Business Administration and other public or private agencies. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-13-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-48.

SECTION 21-66. DISCRIMINATION PROHIBITED.

In the solicitation or awarding of contracts, the city shall not discriminate because of race, religion, color, sex, or national origin of the bidder or offeror. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTIONS 21-67 - 21-69. RESERVED.

ARTICLE VII. ETHICS IN PUBLIC CONTRACTING

SECTION 21-70. PURPOSE.

The provisions of this article supplement, but do not supersede, other provisions of law, including, but not limited to, the Virginia Conflict of Interests Act Code of Virginia §2.1-639.1 *et seq.*, the Virginia Governmental Frauds Act Code of Virginia §18.2-498.1 *et seq.* and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the Virginia Conflict of Interests Act. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-72, 1987 Supp.

SECTION 21-71. DEFINITIONS.

WINCHESTER CODE

The words defined in this section shall have the meanings set forth below throughout this article.

"Immediate family" shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

"Official responsibility" shall mean administrative or operating authority, whether immediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

"Pecuniary interest arising from the procurement" shall mean a personal interest in a contract as-defined in the State and Local Government Conflict of Interests Act (§2.1-639.1 *et seq.*).

"Procurement transaction" shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Public employee" shall mean any person employed by a governing body, including elected officials or appointed members of governing bodies. (Ord. No. 002-83. 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-73.

SECTION 21-72. PROSCRIBED PARTICIPATION BY PUBLIC EMPLOYEES IN PROCUREMENT TRANSACTIONS.

Except as may be specifically allowed by provisions of the Comprehensive Conflict of Interests Act (§2.1-599 *et seq.*), no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the governing body when the employee knows that:

1. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
2. The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or

PURCHASES

3. The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
4. The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-74.

SECTION 21-73. SOLICITATION OR ACCEPTANCE OF GIFTS.

No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The city may recover the value of anything conveyed in violation of this section. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-75.

SECTION 21-74. DISCLOSURE OF SUBSEQUENT EMPLOYMENT.

No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee, employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the city unless the employee, or former employee, provides written notification to the city manager prior to commencement of employment by that bidder, offeror or contractor. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-76.

SECTION 21-75. GIFTS BY BIDDERS, OFFERORS, CONTRACTORS OR SUBCONTRACTORS.

No bidder, offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction any payment, loan subscription, advance, deposit of money, services or anything of more than nominal value, present or

WINCHESTER CODE

promised, unless consideration of substantially equal or greater value is exchanged. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-77.

SECTION 21-76. KICKBACKS.

- (a) No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
- (b) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.
- (c) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
- (d) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the city and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties. (Ord. No. 002-83 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-78.

SECTION 21-77. PURCHASE OF BUILDING MATERIALS, ETC. FROM ARCHITECT OR ENGINEER PROHIBITED.

Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person employed as an independent contractor by the city to furnish architectural or engineering services, but not construction, for such building or structure, or from any partnership, association, or corporation in which such architect or engineer has a pecuniary interest (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-79.

PURCHASES

SECTION 21-78. PENALTY FOR VIOLATION.

Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law; shall forfeit his employment. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-80

